No. 87-1281

Supreme Court, U.S.
FILED
MAY 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PENERS L. GRIFFIN, *et al.*,

Petitioners,

v.

RICHARD L. DUGGER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

PENERS L. GRIFFIN, et al.,
Petitioners,

v.

RICHARD L. DUGGER, et al.,
Respondents.

On Petition For A Writ of Certiorari To
The United States Court of Appeals
For the Eleventh Circuit

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

In their quest to avoid review of the substantive legal issues posed by the petition, the respondents have distorted the factual and procedural record of the proceedings below. In order to insure that consideration of the legal issues raised in the petition is not obscured,

petitioners respond to the most blatant of these misrepresentations.

1. In their introduction, the respondents misstate the thrust of petitioners' argument, as well as the effect of the court of appeals holding. In fact, petitioners plainly do assert the right of Griffin both to charge before the EEOC and to litigate in federal court, his employer's maintenance of a discriminatory working environment, and to show the connection between the employer's hiring policies and the injury he suffers as a result of those policies.

The respondents' formulation ignores the fact that the court of appeals' decision relies upon its holdings that a layman, filing an administrative charge with the Equal Employment Opportunity Commission (EEOC), is required to satisfy the requirements of Article III standing

in order to have that charge investigated and processed by the EEOC, and that Griffin, as an employee, could not challenge hiring discrimination.

2. The respondents' assertion that they did not have a "fair opportunity to litigate the merits of the test below"[1] is without legal or factual foundation.

The respondents had and availed themselves of their full opportunity under Rule 56, F.R. Civ. P., to "litigate the merits of the test" or to show its "job relatedness" or "business necessity". In their response to the motion for summary judgment (R3-120), respondents conceded both that the test had a disparate impact on black applicants[2], and that it had not

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[1] Brief in Opposition, p.9; See also, id., at p.7 n.3.

[2] The exam's disqualification rate for blacks was six times that for whites.

been validated[3], and, acknowledged their burden to show business necessity. Rather than defend the test, however, the respondents claimed that their affirmative action hiring efforts negated its disparate impact.

Nowhere in their response to the Motion for Summary Judgment (R3-120) did respondents contend that the testing issue was not properly before the district court - whether because Griffin lacked standing to raise it or for any other reason. In fact, the respondents later expressly contended that the examination issues had been fully briefed and were "clearly before the Court", thereby

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[3] Respondents argued that the validation study that had been performed was too flawed to be of use to the plaintiffs. Indeed the study showed that the test had a negative validity, in that persons who did well on the test performed relatively poorly on the job, and vice-versa.

making Smith's intervention unnecessary and inappropriate.[4]

3. The respondents' repeated claim that they challenged Griffin's standing to raise hiring issues, including the correctional officer examination, is false. Not once during the pleadings, pretrial motions, discovery, summary judgment proceedings or trial, did respondents assert this defense. Indeed, their litigation posture was quite inconsistent with this assertion.[5]

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[4] Defendants' response to motion to intervene, R4-145-4.

[5] For example, although respondents moved for a protective order (R2-89) limiting discovery, the limitation sought merely to avoid discovery of events occurring prior to 1974, since Griffin's charge was not filed until February of 1975, and was not based on any opposition to the hiring claim. Similarly, a second motion for a protective order (R2-90), filed by the Florida Department of Administration, expressly offered discovery relating to the correctional officer examination.

Before the district court the respondents sought to defeat Smith's post-Falcon intervention by claiming that Griffin adequately represented Smith's interests on the correctional officer hiring claims.

> Not only has Smith failed to show any facts evidencing inadequacy of representation, but also, the record and Smith's own statements refute such a contention. Smith's stated interest in intervening is to "... litigate his (hiring) claims in this action on his own behalf and on behalf of all others similarly situated." Motion, paragraph 6. But Smith also correctly states that "The Plaintiffs have vigorously maintained that the Plaintiff Griffin may properly represent such class members, (applicants) because he has suffered and continues to suffer direct and personal harm by the Defendants' exclusion of other class members (including Smith) from the (DOC's) work force..." Motion, paragraph 5.
>
> In view of the above, Defendants submit that Smith's interests are adequately represented and petitioner is not entitled to intervention as a matter of right pursuant to

> Rule 24(a) Fed. R. Civ. P. (Parenthetical material in respondents' original).

Defendants' response to the motion to intervene. R4-145.

Additionally, in response to the Motion to Certify, (R1-51), respondents merely claimed that the motion was premature, and subsequently entered a stipulation (Petitioner's Appendix 89a) which provided the basis for the district court's order certifying the class.

Contrary to the assertions of the respondents, the stipulation did not "specifically preserve[] their rights to litigate and to appeal the disputed issues of standing. . ." [6] Indeed, the stipulation makes no mention of standing, and suggests that the respondents were more concerned with challenging the merits

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[6] Brief in Opposition to Petition for Writ of Certiorari, p. 5.

of Griffin's claims, than their classwide applicability.[7]

4. Finally, the respondents' assertions that "since Smith had waited a year to file his charge, the EEOC dismissed it for lack of jurisdiction"[8], and that "In effect, petitioners have asked this Court to overrule the EEOC's 1982 determination that Smith's charge was untimely filed"[9], are totally false.

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[7] The Stipulation (See Petitioners' Appendix 89a, 91a) reads in pertinent part:

> "4. The claims of the named plaintiffs are, under current law in the United States Court of Appeals, Fifth Circuit, similar to those of other members of the proposed class. The parties maintain their right to brief these issues on appeal, if any. The Defendants believe that the employment record of the Plaintiff Griffin is not typical, but recognize that this issue relates to the merits of the claim rather than to the existence of the claim".

[8] Brief in Opposition, p.21.

[9] Id.

There is nothing in or out of the record to support this assertion. The EEOC made no such determination, and in fact issued Smith a right to sue letter.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 6, 1988